IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1977

CHARLES EDWARD DOWNS, *

APPELLANT-PETITIONER, *

vs. * CASE NO. 77-5541

THE STATE OF OHIO, *

APPELLEE-RESPONDENT. *

ON PETITION FOR WRIT OF CERTIORARI TO THE

SUPREME COURT OF THE UNITED STATES

RESPONDENT'S BRIEF IN OPPOSITION

James W. Luse
Prosecuting Attorney
Fairfield County, Ohio
Room 314
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Lancaster, Ohio 43130

ATTORNEY FOR APPELLEE

(614) 653-4256

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STATEMENT OF THE CASE

The Defendant, Charles Edward Downs, the Appellant herein, was tried before a jury upon three (3) counts of aggravated murder in violation of Section 2903.01 (A) of the Ohio Revised Code with aggravating circumstances delineated as specifications for the imposition of the death penalty as provided by Section 2929.04 (A) (5) of the Ohio Revised Code. The prosecution presented 32 witnesses to prove the defendant's guilty beyond a reasonable doubt during the course of a two week trial. The jury returned a verdict of guilty against the defendant of three (3) counts of aggravated murder in violation of Section 2903.01 (A) of the Ohio Revised Code and a separate verdict of guilty of a specification as to each count in violation of Section 2929.04 (A) (5) of the Ohio Revised Code. An accurate detailed statement of the facts concerning the commission of these three crimes is contained in the decision rendered by the Supreme Court of Ohio affirming these convictions found in State vs. Downs, 51 Ohio St. 47 (1977).

Section 2923.03 of the Ohio Revised Code outlines the procedure for the imposition of sentence for capital offenses. This section of the code states that once a verdict of guilty has been returned against the defendant in a trial by jury both upon the charges of aggravated murder and one or more specifications, the trial judge shall conduct a mitigation hearing. Section 2929.03 (D) of the Ohio Revised Code requires that the trial judge shall have a pre-sentence investigation prepared and a psychiatric examination to be made of the defendant. The Court then shall hear testimony and other evidence, including the statement, if any, of the offender, and arguments of counsel relevent to the penalty which should be imposed upon the offender.

Under Section 2929.03 (E), the Court shall determine, based upon the reports, testimony and any other evidence, including the statement of the offender and arguments of counsel, whether any

of the mitigating circumstances listed in Division (B) of Section 2929.04 of the Ohio Revised Code are established by a preponderance of the evidence. If any mitigating circumstances are are established by a preponderance of the evidence, the defendant shall be sentenced to life imprisonment. If none of the mitigating circumstances are established by preponderance of the evidence, the Court shall impose a sentence of death on the offender.

The mitigating circumstance alleged by this defendant is contained in Section 2929.04 (B) (3) of the Ohio Revised Code, which provides that it is a mitigating circumstance if the offense was primarily a product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity.

It is to be noted that under Section 2929.03 (D) (E) of the Ohio Revised Code, it is the Court which has the duty to have prepared the pre-sentence report and to have the defendant examined by a psychiatrist. The state did not move to have the defendant examined by its own psychiatrist. The psychiatrist who testified to enable the Court to determine the proper penalty in this case was the Court's witness. The fact that this procedure was followed in this case is indicated in an entry filed on November 12, 1975, a copy of which is attached, and marked as Appendix A.

The Appellant herein, alleges in its statement of the case that the defendant was required to carry the burden of proof by preponderance of the evidence on the issue of mitigation. There is nothing in the record or in the statutory provisions under the Ohio Revised Code in Section 2929.03 (D) and (E) which makes any reference to either party having the burden of proof by a preponderance of the evidence upon the issue of mitigation. The mitigation hearing is not an adversary hearing. Therefore, Sections 2929.03 and 2929.04 of the Ohio Revised Code, Ohio's statutory procedure for imposing the death penalty, do not place

an unconstitutional burden of proof upon the defendant and do not violate the due process clause of the Fourteenth Amendment of the Constitution of the United States.

QUESTION OF LAW NO. ONE

SECTION 2929.03 (E) OF THE OHIO REVISED CODE REQUIRING THE COURT TO FIND A MITIGATING CIRCUMSTANCE LISTED IN SECTION 2929.04 (B) OF THE OHIO REVISED CODE TO BE ESTABLISHED BY A PREPONDERANCE OF THE EVIDENCE AFTER A DEFENDANT HAS BEEN CONVICTED OF AGGRAVATED MURDER WITH AGGRAVATED SPECIFICATIONS DOES NOT VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

The Supreme Court of Ohio, in affirming the death sentence imposed upon Appellant, states in paragraph one of its syllabus, that Ohio's sentencing procedure for a capital offense is "not an adversary proceding" because under provisions of the Ohio Revised Code Sections 2929.03 (D) and (E) and 2929.04 (B), neither the defendant nor the prosecution is required by these sections of the code to offer testimony or other evidence of a mitigating circumstance.

The Appellant then states that this is illogical since if the defendant presented no evidence, no mitigating circumstances could possibly be established. This clearly is not what Section 2929.03 (E) of the Ohio Revised Code indicates is the law in Ohio. The Court based upon the pre-sentence report required by this section of the code and the psychiatric examination of the defendant could easily find the existence of a mitigating circumstance had been established by a preponderance of the evidence without either side presenting any evidence. Even the statement of the defendant could be sufficient for the Court to find proof by preponderance of the evidence of the existence of a mitigating circumstance. The mitigation hearing is not an adversary proceeding but merely a hearing for the Court to determine the appropriate penalty under the law.

The Appellant relies primarily on Mullaney vs. Wilbur, 421 U. S. 684 (1975), to support his first Proposition of Law that Ohio Statutory scheme as outlined in Sections 2929.03 and 2929.04 of the Ohio Revised Code violates the due process requirements of the Fourteenth Amendment of the Constitution of the United States. It is Appellee's position that Mullaney, supra, is not applicable

to the case at bar.

In Mullaney, the Supreme Court of the United States struck down a Maine statute which required a Defendant charged with murder to prove by preponderance the evidence that he acted in a heat of passion on sudden provocation in order to reduce a murder charge to manslaughter in order to receive a lesser penalty. Under the Maine statute, it was only necessary for the state in a homicide case to prove that there was a felonious homicide and that the homicide was unlawful and that it was intentional. Malice aforethought was allowed to be presumed, if the first two elements were proved, unless the Defendant proved by preponderance of the evidence that he acted in the heat of passion on sudden provocation.

The Supreme Court in that decision held that the statute was unconstitutional because it was necessary for the state to prove beyond a reasonable doubt all of the "elements" of the offense of murder and that an essential element of murder was malice. The Court reasoned that to allow malice to be presumed and requiring the defendant to prove lack of malice by a preponderance of the evidence, the State in effect was shifting the burder of proving the guilt of the defendant on an essential element, malice, from the state to the defendant, which violated the due process clause of the United States Constitution.

The Supreme Court held that in order to sustain a conviction for murder in Maine, as in all cases, the state must prove each and every "element" of that offense, to-wit; murder, beyond a reasonable doubt. The Court held that malice was an essential element which the state must prove beyond a reasonable doubt. This is in conformity with the courts previous holding In Re Winship, 397 U. S. 358 (1970), wherein the Court held that in juvenile cases, it would still be necessary under the due process clause of the Fourteenth Amendment of the United States Constitution that a finding of guilty in a juvenile case could only be based upon proof beyond a reasonable doubt and not by a preponderance of the evidence.

The decision in Mullaney, supra, did not turn upon the penalty which followed the conviction, but only upon requiring the state to prove an essential element of the crime murder beyond a reasonable doubt. The issue of provocation in a homicide case and mitigation hearings in capital cases are historically dissimilar. The Supreme Court noted in Mullaney, supra, that the decision was not to be interpretated as casting doubt upon the discretion of trial judges to impose varying sentences for the commission of the same crime and that proof beyond a reasonable doubt of those factors considered by the judge in making his decision as to the appropriate sentence was not required by Mullaney, supra, at page 697, fn. 23, C, also, Proffitt vs. Florida (1976), 428 U. S. 242, 49 L. Ed., Second 913.

The Supreme Court of Ohio in interpretating Division (B) of Section 2929.04 of the Ohio Revised Code , which required a mitigating circumstance to be established by a preponderance of the evidence, held that the lack of mitigating circumstances was not an additional constitutionally mandated element of a capital offense, and that the state was not constitutionally required to prove the lack of such mitigating circumstances beyond a reasonable doubt.

The State has met all constitutional mandates required by the Fourteenth Amendment of the Constitution of the United States under Ohio Revised Code Section 2929.03 (B) of the Ohio Revised Code, when, the state has proven the defendant's guilt beyond a reasonable doubt of aggravated murder and guilt beyond a reasonable doubt of the aggravated circumstances.

The death penalty is precluded if one or more mitigating circumstances is established or preponderance as outlined by Section 2929.03 (B) of the Ohio Revised Code, which reads as follows:

> "(B) Regardless of whether one or more of aggravating circumstances listed in division (A) of this section is specified in the indictment and proved beyond a reasonable doubt, the death penalty for aggravated murder is precluded when, considering the nature and circumstances of the offense and the history, character, and condition of the offender, one or more of the following is established by a preponderance of the evidence:
> (1) The victum of the offense induced or facilitated it.
> (2) It is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation.
> (3) The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity." (Emphasis added.)

The determination of the absence or presence of mitigating circumstances is not an element of the crime itself. It is merely a matter of sentencing.

The Appellant urges that even if the state is not required to prove lack of mitigating circumstances beyond a reasonable doubt as an element of a capital offense, placing the burden upon the defendant to prove a mitigating circumstance violates the due process requirements of the Fourteenth Amendment of the United States Constitution.

The Supreme Court of Ohio, in syllabus five of the Court's decision, answered this question when the Court held that Ohio Revised Code Section 2929.03 (E), which requires that a mitigating circumstance be established by a preponderance of the evidence, did not impose an unconstitutional burden upon the defendant which would render the Ohio Statutory frame work for the imposition of capital punishment unconstitutional. The Ohio Supreme Court held that Section 2929.03 (E) of the Ohio Revised Code placed no burden upon the defendant but only required that the defendant bear the risk of nonpersuasion during the mitigation hearing.

The duty of deciding whether the penalty shall be life imprisonment or death under Ohio law falls upon the trial judge if there has been a jury verdict of guilty of aggravated murder and guilty of one of the aggravated specifications. The relevant Code Section is 2929.03 (C), (D), and (E) of the Ohio Revised Code, which states:

> "(C) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of

aggravating circumstances listed in Division (A) of Section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge but not guilty of each of the specifications, the trial court shall impose sentence of life imprisonment on the offender. If the indictment contains one or specifications listed in Division (A) of such section, then following a verdict of guilty of both the charge and one or more specifications, the penalty to be imposed on the offender shall be determined:
(1) By the panel of three judges which tried the offender upon his waiver of the right to trial by jury;
(2) By the trial judge, if the offender was tried by a jury.
(D) When death may be imposed as a penalty for aggravated murder, the court shall require a pre-sentence investigation and a psychiatric examination to be made, and reports submitted to the court, pursuant to section 2947.06 of the Revised Code. Copies of the reports shall be furnished to the prosecutor and to the offender or his counsel. The Court shall hear testimony and other evidence, the statement, if any, of the offender, and the arguments, if any, of counsel for the defense and prosecution, relevant to the penalty which should be imposed on the offender. If the offender chooses to make a statement, he is subject to cross-examination only if he consents to make such statement under oath or affirmation.
(E) Upon consideration of the reports, testimony, other evidence, statement of the offender, and arguments of counsel submitted to the court pursuant to Division (D) of this section, if the court finds, or if the panel of three judges unanimously finds that none of the mitigating circumstances listed in division (B) of Section 2929.04 of the Revised Code is established by a preponderance of the evidence, it shall impose sentence of death on the offender. Otherwise, it shall impose sentence of life imprisonment on the offender." (Emphasis added.)

Under Ohio law, it is the Court who gets the pre-sentence investigation, orders the psychiatric examination, listens to the arguments of counsel, and to the defendant, if he desires to make a statement, and determines what penalty should be in a capital case. It should be noted the last sentence of paragraph (B) of Section 2929.04 which outlines the mitigating circumstances states that if one or more of them is established by a preponderance of the evidence, then the death penalty is precluded.

This section of the code does not say that the Defendant must prove any of the mitigating circumstances by preponderance of the evidence, but rather that the court must determine based upon all evidence that is adduced at the mitigation hearing, whether any

of the mitigating circumstances is established by a preponderance of the evidence.

The Court upon consideration of reports, testimony, and any other evidence, including the statement of the offender and arguments of counsel, then determines whether it has been established by a preponderance of the evidence whether or not one of the mitigating circumstances exists in the case. There is no requirement upon the defendant to prove anything.

The Court could very well find from the reports, the testimony at the trial itself, the pre-sentence report, the psychiatric examination and report, or the arguments of counsel, that a mitigating circumstance had been established by a preponderance of the evidence, without the defendant presenting any evidence or without the state presenting any evidence. Likewise, the Court could find that no mitigating circumstance had been established by a preonderance of the evidence, without either the state or the defendant presenting any evidence.

In Re Winship, supra, and Mullaney vs. Wilbur, supra, dealt with the guilt phase rather than the sentencing phase of a case. The Appellant has cited no case in which the United States Supreme Court has held that the lack of a mitigating circumstance was an additional, constitutionally mandated element of a capital offense. The due process clause of the United States Constitution does not require proof beyond a reasonable doubt of any factors a Court might consider at the sentencing phase of a case.

In Proffitt, supra, at pages 248-250, the Supreme Court of the United States approved the Florida statutory sceme for sentencing, which provided for a separate evidentiary hearing to be held before the trial judge and jury to determine the sentence in a capital case. The Florida statute provided that evidence may be presented on any matter the judge deems relevant to sentencing and must include matters relating to certain legislatively specified aggravating and mitigating circumstances. Although Ohio's capital sentencing procedure differs somewhat from the procedure approved

by the United States Supreme Court in Proffitt, the Appellee would urge that the differences are not of constitutional significance.

QUESTION OF LAW NO. TWO

WHEN A DEFENDANT HAS RAISED THE ISSUE OF MENTAL CAPACITY AS A MITIGATING CIRCUMSTANCE PURSUANT TO SECTION 2929.04 (B) (3) OF THE OHIO REVISED CODE, THERE IS NO CONSTITUTIONAL REQUIREMENT THAT THE COURT APPOINT AN ADDITIONAL PSYCHIATRIST OF THE DEFENDANT'S CHOOSING AT STATE EXPENSE AFTER THE COURT HAS ALREADY APPOINTED A PSYCHIATRIST AND A PSYCHOLOGIST UNDER PROVISIONS OF OHIO REVISED CODE SECTION 2929.03 (D) AND PURSUANT TO OHIO REVISED CODE SECTION 2947.06.

Again the Defendant-Appellant insists that the burden of proof was on him to show psychosis or mental deficiency as a mitigating circumstance under Section 2929.04 (B) (3) of the Ohio Revised Code. The Appellee would respectfully submit that Defendant-Appellant is not required to prove the existence of psychosis or mental deficiency as a mitigating circumstance.

Section 2929.03 (D) provides that when the death penalty may be imposed, the Court shall require a pre-sentence investigation and a psychiatric examination to be made of the defendant. Copies of such report should be furnished to the prosecutor and to the offender or his counsel.

The Appellant argues that the only experts made available to him were those selected by the Court and directed by the Court in their evaluation of the defendant. This is true, but this is exactly what Revised Code Section 2929.03 (E) of the Ohio Revised Code requires. The psychiatrist and psychologists who testified at the mitigation hearing were the Court's witnesses and not the State's or the defendant's.

A mitigation hearing was had on January 22, 1976, before the Honorable Merlin C. Parent, Judge of the Common Pleas Court of Fairfield County, Ohio, at which time two psychologists and one psychiatrist testified concerning the mental status of the Defendant-Appellant herein. Dr. Harold T. Brown, the only psychiatrist who testified at the hearing, stated that he had received a letter from Judge Parent concerning the facts in this case and that the Court was requesting a psychiatric examination. A copy of this letter is marked Appellee's Appendix B and attached hereto.

It is the Appellee's contention that this letter definitely establishes the Appellee's point that the two psychologists and the psychiatrist were the Court's witnesses and were performing the examination for the Court's determination of the appropriate sentence in this case. Both the State and the Defendant had access to the reports and an opportunity to cross-examine the psychiatrist and the psychologists at the mitigation hearing. The State did not hire it's own psychiatrist in an attempt to gain some forensic advantage.

Dr. Harold T. Brown testified at the mitigation hearing that in his opinion the defendant was a passive-aggressive personality. Dr. Brown further stated that the Defendant did have a concept between right and wrong and that he knew it was wrong to kill somebody (TR 7, page 58). A passive-aggressive personality as described by Dr. Brown is evidenced by a person who is immature, anti-authority, dependent, who resents that dependence, reacts passively to authority, and is very pleasure oriented. In addition, Dr. Brown indicated that a passive-aggressive personality disorder is not a psychosis, (TR 7, page 58). A question was asked Dr. Brown whether the defendant in this case suffered from a mental deficiency to which he replied, "No." (TR 7, page 60) The Defendant was not retarded according to Dr. Brown. (TR 7, page 60)

Finally, counsel for the State put forth a hypothetical question to Dr. Brown outlining in detail all the essential facts of how the triple aggravated murder occurred as established by the evidence at the trial. Then Dr. Brown was asked to assume all these facts to be true and then to give his opinion, if such an offense as described to him had been done by the defendant, would such an offense have been primarily the product of a psychosis or a mental deficiency that the defendant had. Dr. Brown responded, "No, I would not see any indication of psychosis or deficiency in any of that." (TR 7, page 61 through 63). Dr. Brown was finally asked whether a passive-aggressive personality as he had diagnosed

in the defendant had the ability to control his conduct if he so choses. Dr. Brown responded, "I think they do." (TR 7, page 69).

The Court based upon reports it had received, the testimony of two psychologists and a psychiatrist and the arguments of counsel, found that no mitigating circumstance had been established by a preponderance of the evidence and imposed the death penalty. The procedures followed were conducted in accordance with the law in the State of Ohio as outlined in Section 2929.03 of the Ohio Revised Code.

The Appellant cites the case of Gideon vs. Wainwright, 372 U. S. 335, (1967) in support of his contention that the defendant should have been able to hire his own psychiatrist in this particular case to assist him to prove the mitigating circumstance of psychosis or mental deficiency. Gideon vs. Wainwright, supra, held that under the Sixth Amendment in all criminal prosecutions, the accused shall enjoy the right to have the assistance of counsel. The Defendant in this case had two able counsel appointed for him, so the requirements of Gideon, supra, have been met. The Appellant cites no case to support his proposition that he is entitled to have his own psychiatrist appointed under circumstances appropriate in this case.

Even in the case of the right to counsel, as required by Gideon, supra, the defendant is not entitled to the appointment of counsel of his choice. See notation, Indigent Accused Right to Choose Particular Counsel Appointed to Assist Him, 66ALR 3rd 996, Section 3.

When the Court holds a mitigation hearing under provisions of Revised Code Section 2929.03 (D) of the Ohio Revised Code, having appointed a psychiatrist and a psychologist pursuant to Ohio Revised Code 2947.06, it is not constitutionally required to appoint an additional psychiatrist of the defendant's choosing at the state's expense.

CONCLUSION

It is respectfully submitted that the conviction of the defendant and imposition of the death penalty were in all respects legal and proper under the law of the State of Ohio and the Constitution of the United States and that therefore certiorari to the United States Supreme Court should not be granted.

Respectfully submitted,

James W. Luse

James W. Luse
Prosecuting Attorney
Fairfield County, Ohio

LAW OFFICES OF
JOHN D. MARTIN
JAMES W. LUSE
EQUITABLE BUILDING
LANCASTER, OHIO

APPELLEE'S APPENDIX "A"

IN THE COURT OF COMMON PLEAS, FAIRFIELD COUNTY, OHIO

The State of Ohio,

vs.

Charles Edward Lamb,

Defendant.

On this 31st day of October, 1975, appeared John D. Martin, Prosecuting Attorney of Fairfield County, Ohio, and James W. Luse, Assistant Prosecuting Attorney of Fairfield County, Ohio, on behalf of the State of Ohio; also appeared the defendant, Charles Edward Lamb, with his counsel, C. Gene Jackson and John J. Adams.

The defendant was heretofore indicted by the Grand Jury of Fairfield County, Ohio, during the May Term, 1975, charging him with three counts of aggravated murder, in violation of Section 2903.01 of the Ohio Revised Code, with specification in all three counts [illegible] Section 2929.04 ( ) subsection (5) of the Ohio Revised Code.

On the 3rd day of September, 1975, the defendant was brought upon the indictment at which time the defendant appeared with his counsel, John D. Martin. The defendant acknowledged that he had received a copy of the indictment on August 19, 1975, and signed an acknowledgment that he received the indictment, which was accepted by the Court. The Clerk of Courts read the indictment to the defendant after which time the Court explained to the defendant the nature of the charges against him, the penalties involved, and his rights under the Constitution and the laws of this State. The defendant then entered a plea of not guilty to all three counts contained in the indictment which said not guilty pleas were accepted by the Court.

This case having been regularly set for trial on the 28th day of October, 1975, and a jury duly impaneled and sworn, and following, the presentation of the evidence and the instruction of the Jury by the Court, a verdict of guilty was returned as to each of the three counts of aggravated murder in violation of

Section 2903.01 and a verdict of guilty as charged to each of the specifications in all three counts in violation of Section 29_9.04 (A) Subsection (5) of the Ohio Revised Code as contained in a copy of the verdicts attached hereto and made a part hereof, were returned by the jury this 31st day of October, 1975.

The Court following the reading of the verdicts accepted said verdicts. Pursuant to Revised Code Section 2929.04 it is therefore ORDERED that the Bailiff, Wayne Church, prepare a pre-sentence report and present the same in writing, to the Court. It is further ORDERED that Dr. Harold T. Brown of the Fairfield County Mental Health Clinic be appointed and ordered pursuant to Revised Code Section 29_9.04 to make a psychiatric examination of the defendant and submit his report to the Court pursuant to Revised Code Section 2947.06. It is further ORDERED that copies of the report shall be furnished to the Prosecutor and to the Defendant and his respective counsel.

Following the completion of said pre-sentence report and the presentation of the same to the Court this matter shall then be set down for further proceedings according to law.

_____
Merlin C. Parent--Judge

APPROVED BY:

_____
John D. Martin
Prosecuting Attorney

_____
James W. Luse
Assistant Prosecuting Attorney

_____
J. Gene Jackson
Counsel for Defendant

_____
John J. Charles
Counsel for Defendant

LAW OFFICES OF
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COURT OF COMMON PLEAS
FAIRFIELD COUNTY
LANCASTER, OHIO
43130

MERLIN C. PARENT
JUDGE
TELEPHONE 654-6530
AREA CODE 614

E. RAYMOND MORCHART
JUDGE
TELEPHONE 654-6530
AREA CODE 614

November 6, 1975

Dr. Harold T. Brown
Psychiatrist-Director
Fairfield County Clinic for
Guidance and Mental Health
201 S. Broad Street
Lancaster, Ohio 43130

DEFENDANT'S EXHIBIT B

Re: Charles Edward Downs

Dear Dr. Brown:

Charles Edward Downs has been convicted of three counts of aggravated murder. The penalty is death unless the defense or a psychiatric examination shows mitigating circumstances. If such mitigating circumstances exist the penalty is life imprisonment on each of the three counts.

Consequently, we are requesting that you and your staff make a thorough examination of the defendant and render a detailed and complete report to the Court showing your findings, evaluations and recommendations. A Court order is attached hereto authorizing you to make such examination and make your report to the Court. The law, also, provides that a photostatic copy be served upon the defendant by the Court.

The victims, Steven Richard Bailey, Connie S. Hodgman and her 7 year old daughter, Tracey Hodgman, resided in a three room house located in the center of a dense thicket in southern Fairfield County. A one way lane (approximately a mile long through the thicket) led to the house. Another path (hardly discernible) lead from the cabin to a highway in the opposite direction from the lane.

All three victims were shot three times with a 16 gauge shotgun, the final shot in each case being fired at extremely short range. The woman had been stabbed several times in and about the neck. The man and woman were found out in the yard near their motor vehicle 30 or 40 feet from the house. The little girl was found under one of the beds in a bedroom where she was partially covered with a mattress and another cover of some sort.

Testimony at the trial indicated that Steven Bailey, the defendant and a number of other people who testified at the trial were engaged in the illegal purchase, sale and use of marijuana. The defendant and another party had given Steven Bailey $400.00 (approximately) to purchase marijuana a few weeks before the murders. Bailey returned without either the marijuana or the

money. His story was that he thought that he was being followed and had to throw it out of the car window. Testimony was presented that it was a "rip-off" and that the defendant suspected that such was the case.

The testimony further indicated that on the day of the murders that Mr. Downs, Ronald Byers and the defendant's twenty year old girl friend (who was living with him at the time) went into southern Fairfield County to examine and/or service his marijuana patches. After examining the second patch the defendant indicated that his marijuana patch or patches had been "ripped off" and he suspected Bailey of being the culprit. The testimony indicated that he threatened to kill Bailey and that he said he really did not want to kill Connie Hodgman and her daughter but that it would be necessary to do so as they would be witnesses to the killing of Steven Bailey. The testimony further indicates that they then returned to his home at 235 Maude Avenue where they got his 16 gauge shotgun and a box of shotgun shells. The three of them went to a remote spot where the defendant took the gun, some shells and a hunting knife and told Byers to pick him up in a couple of hours. Byers allegedly picked him up as instructed but the defendant's girl friend was not along on this trip.

During the two weeks trial the defendant showed little or no emotion. He did not testify in his own defense.

Charles Edward Downs was born on November 6, 1944. He was unmarried although Virginia Browning, age 20, was living with him. Virginia Browning is an epileptic and has been advised not to drink or smoke pot but she persists in doing both. Marijuana parties apparently were not unusual with them and their friends.

The defendant dropped out of Amanda Clearcreek School during his sophomore year. He has worked at many jobs. At the time the crimes were committed he was employed at the Loroco Paper Mill where he operated rather intricate automatic machinery.

The defendant has been a resident of Fairfield County for the past 16 years. Prior to that time he lived in Hocking and Pickaway Counties. His brother, Robert Lee Downs, was convicted of murder of an elderly man 21 years ago in Hocking County. The story is that it was committed for money but that only between 25¢ and 30¢ was obtained. The brother was just recently released from prison because of that offense.

Mr. Downs now claims that since his apprehension (and prior to that time) he accepted God and is now a christian, his preference of church being the Church of Christ. Mr. Downs comes from a family of 5 boys and 6 girls. His father is deceased and his mother lives in Stoutsville, Ohio with one of her daughters.

The defendant insists that the death sentence be imposed because he does not want to spend the balance of his life in the penitentiary.

Charles Edward Downs has an extensive criminal record, some of which are

as follows:

1-8-66 charged with strong armed robbery, given probation on unarmed robbery;

10-28-67 sent to Ohio Penitentiary for parole violation. (assault and battery and resisting arrest), sentenced 1-25 years;

10-21-69 paroled from Lebanon Correctional Institution;

8-6-71 charged with contributing to the delinquency of a minor. Case dismissed in Pickaway County Juvenile Court;

9-15-71 charged with breaking and entering in the night season. Jury found him guilty of both counts on 3-7-72. He was sentenced to 1-15 and 1-7 to be served concurrently;

3-22-73 he was paroled from London Correctional Institution.

I trust that this will give you sufficient information to proceed with your examination.

Respectfully submitted,

Martin G. Pucci

MCP:lc
Enc. Court order

APPELLEE'S APPENDIX "C"

Court of Common Pleas, Fairfield County, Ohio

September Term, A. D. 19 75

FILED OCT 31 12 50 PM '75 ROBERT H. LACEY CLERK OF COURTS FAIRFIELD CO. OHIO

JR 152 PG 631

THE STATE OF OHIO

vs.

Charles Edward Downs

No. 7606

Indictment for

Aggravated Murder (3 counts)

We, the Jury in this Case, being duly impaneled and sworn to well and truly try and true deliverance make between the State of Ohio and the defendant Charles Edward Downs, find the defendant, Charles Edward Downs Guilty
Guilty-Not Guilty
of Aggravated Murder in violation of Section 2903.01 of the Revised Code of the State of Ohio as he stands charged in the First Count of the Indictment and, further find the the defendant, Charles Edward Downs, Guilty
Guilty - Not Guilty
of Aggravated Murder in violation of Section 2903.01 of the Revised Code of the State of Ohio as he stands charged in the Second Count of the Indictment and, further find the defendant, Charles Edward Downs, Guilty
Guilty - Not Guilty
of Aggravated Murder in violation of Section 2903.01 of the Revised Code of the State of Ohio as he stands charged in the Third Count of the Indictment.

And, we do so render our verdict upon the concurrence of twelve members of said Jury. Each of us said jurors concurring in said verdict signs his/her name hereto this 31 day of Oct. 1975.

1 Clarke J. Sieger 7 [signature] R Hoffman
2 Judy M. Hill 8 Wayne Bosworth
3 Calvin L. Poling 9 Bernard M. Cuccio
4 [signature] M. Baker 10 Wilcie L. [signature]

Court of Common Pleas, Fairfield County, Ohio

September Term, A. D. 19 75

FILED OCT 31 12 49 PM '75 ROBERT H. LACEY CLERK OF COURTS FAIRFIELD CO. OHIO

JR 152 PG 630

THE STATE OF OHIO

vs.

Charles Edward Downs

No. 7606

Indictment for

Aggravated Murder (3 Counts)

R.C. 2903.01

We, the Jury, find the defendant, Charles Edward Downs Guilty
Guilty - Not Guilty
of the following specification: The offense at bar was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the offender; as he stands charged in the First Count of the Indictment.

We, further find the defendant, Charles Edward Downs Guilty
Guilty - Not Guilty
of the following specification: The offense at bar was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the offender; as he stands charged in the Second Count of the Indictment.

We, further find the defendant, Charles Edward Downs Guilty
Guilty - Not Guilty
of the following specification: The offense at bar was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the offender; as he stands charged in the Third Count of the Indictment.

And we do so render our verdict upon the concurrence of twelve members of said Jury. Each of us said jurors concurring in said verdict signs his/her name hereto this 31 day of Oct 1975.

1 Clarke J. Sieger 7 [signature] R Hoffman
2 Judy M. Hill 8 Wayne Bosworth
3 Calvin L. Poling 9 Bernard M. Cuccio

§2929.03 Imposing sentence for a capital offense.

(A) If the indictment or count in the indictment charging aggravated murder contains no specification of an aggravating circumstance listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge, the trial court shall impose sentence of life imprisonment on the offender.

(B) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, the verdict shall separately state whether the accused is found guilty or not guilty of the principal charge and, if guilty of the principal charge, whether the offender is guilty or not guilty of each specification. The jury shall be instructed on its duties in this regard, which shall include an instruction that a specification must be proved beyond a reasonable doubt in order to support a guilty verdict on such specification, but such instruction shall not mention the penalty which may be the consequence of a guilty or not guilty verdict on any charge or specification.

(C) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge but not guilty of each of the specifications, the trial court shall impose sentence of life imprisonment on the offender. If the indictment contains one or more specifications listed in division (A) of such section, then, following a verdict of guilty of both the charge and one or more of the specifications, the penalty to be imposed on the offender shall be determined:

(1) By the panel of three judges which tried the offender upon his waiver of the right to trial by jury;

(2) By the trial judge, if the offender was tried by jury.

(D) When death may be imposed as a penalty for aggravated murder, the court shall require a pre-sentence investigation and a psychiatric examination to be made, and reports submitted to the court, pursuant to section 2947.06 of the Revised Code. Copies of the reports shall be furnished to the prosecutor and to the offender or his counsel. The court shall hear testimony and other evidence, the statement, if any, of the offender, and the arguments, if any, of counsel for the defense and prosecution, relevant to the penalty which should be imposed on the offender. If the offender chooses to make a statement, he is subject to cross-examination only if he consents to make such statement under oath or affirmation.

(E) Upon consideration of the reports, testimony, other evidence, statement of the offender, and arguments of counsel submitted to the court pursuant to division (D) of this section, if the court finds, or if the panel of three judges unanimously finds that none of the mitigating circumstances listed in division (B) of section 2929.04 of the Revised Code is established by a preponderance of the evidence, it shall impose sentence of death on the offender. Otherwise, it shall impose sentence of life imprisonment on the offender.

HISTORY: 134 v H 511. Eff 1-1-74.

§2929.04 Criteria for imposing death or imprisonment for a capital offense.

(B) Regardless of whether one or more of the aggravating circumstances listed in division (A) of this section is specified in the indictment and proved beyond a reasonable doubt, the death penalty for aggravated murder is precluded when, considering the nature and circumstances of the offense and the history, character, and condition of the offender, one or more of the following is established by a prepondence [preponderance] of the evidence:

(1) The victim of the offense induced or facilitated it.

(2) It is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation.

(3) The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity.

HISTORY: 134 v H 511. Eff 1-1-74.